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SOME CONSIDERATIONS IN SUPPORT OF THE CONSTITUTIONALITY OF RURAL ZONING AS A POLICE POWER MEASURE

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Foreword

The character of this study should not be misunderstood. It represents a search through the judgments of American Courts for doctrines which can be used in support of reasonable rural zoning ordinances enacted in pursuance of well thought out rural zoning enabling legislation. No one will know that rural zoning is constitutional in any State until it has been tested in the courts; but by the same token, no one will know that it is unconstitutional. No court test has yet occurred; but it is not inappropriate that those who believe in the long-run necessity and the intrinsic reasonableness of zoning poor land out of agriculture, should marshal whatever judicial precedents are available in its support. It may well be hoped that such a study as this may assist in the sometimes slow transformation of what is intrinsically reasonable into what is constitutionally reasonable.

This study is not a brief, and it is not designed to be. It resembles a brief in that it explores legal doctrine from a fixed point of view in a situation in which another point of view is possible; but it is directed to no specific zoning enabling act or ordinance, and the arguments in it would have to be more closely focused on a particular case to have persuasive value before a court.

This study falls somewhere between a lawyer's brief and a judicious law review article. It is believed, however, that this study might well be read by lawyers, especially lawyers drafting rural zoning legislation who are perplexed by constitutional doubts, and by lawyers called upon to argue the constitutionality of zoning legislation. This study may not give such lawyers a brief, but will give them an atmosphere in which a living and persuasive brief might be prepared. Past conflicts between the State's police power and private rights have sometimes ended disastrously for the former, because, while the private right involved was a tangible, visible and valuable thing, the "general welfare" was argued only as a vague and immaterial desideratum, whose value was infinitesimal to the average citizen. This study seeks to avoid such a result for rural zoning by showing the reality and tangibility of the material interest of the "general welfare" in it. "General welfare" is here no elusive thing; it is preservation of the State's lands, waters and foods; it is protection of land values, upon which the State's capacity to live through taxation is based; it is protection of people from fire, flood, and disease; it is the rooting of families of stable citizens in worthwhile communities. All of these objects have been supported by the courts in one setting or another; there is no conclusive reason why

they should not be supported in the setting of rural zoning. At any rate, there should be no excuse for a failure to set up the materiality of the public's interests before the courts, so that they can weigh them against those of a non-conforming user. To deprive judges of the opportunity to weigh their interests fully is to become partly responsible for failures of judicial statesmanship.

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NOTE: The present study is a complement to a separate study on problems in connection with a rural zoning enabling act, by the same author: Land-Use Planning Publication No. 10. To have a rounded picture of rural zoning it is necessary to have acquaintance as well with the important work of Dr. C. I. Hendrickson of the Bureau of Agricultural Economics and Professor G. S. Wehrwein of the University of Wisconsin, and of Mr. W. A. Rowlands.

SOME CONSIDERATIONS IN SUPPORT OF THE CONSTITUTIONALITY OF RURAL ZONING AS A POLICE POWER MEASURE 1/

Rural land-use zoning, despite its air of something novel, may be said to be at bottom but the application of principles already well established, lying both in its adjective and its substantive aspects fully within the lines drawn by precedent. Its newness would come in its incidents and its extent rather than in its fundamental character.

SECTION I

PRECEDENTS WHICH SEEM TO JUSTIFY ZONING FOR RURAL LAND-ITS PRODUCTIVE USE

Zoning Within Cities

Zoning, as a measure regulating the use of property, has by now become so thoroughly accepted in the case of cities that no citation of the fact is necessary. Rural zoning would simply adapt this type of measure to the conditions of non-urban areas. In each case there are restrictions placed upon the use of land. The circumstance that on the surface city zoning frequently appears to involve merely a regulation of buildings, should not be allowed to obscure the fact that city zoning is fundamentally a regulation of the use to which land can be put. The Supreme Court of Pennsylvania remarked in Perrin's Appeal 2/ that the "exercise of the police power through zoning laws is an appropriate method of limiting the owner's right to use land;" and thereby put its finger on the essence of all zoning. One student of zoning, the Secretary of the American Civic Association

1/ This discussion is not a lawyer's brief, but, rather, it is intended to bring together, in a general treatment, constitutional doctrine which seems to be demonstrative of the validity of rural zoning as an exercise of the police power.

2/ 305 Pa. 42, 45 (1931).

and of the Federated Societies on Planning and Parks, has given a definition of city zoning which is also particularly in point: "Zoning may be said to be the control by organized communities of the use of privately owned as well as public land in the interest of the general welfare." 3/ Again, "the use . . . of land" as an object of zoning regulation figures in the bulk of the Zoning Enabling Statutes. (See, for example, the first section of the "Standard State Zoning Enabling Act" for municipalities 4/ which forms the basis of the zoning legislation of some thirty-nine States.)

In cities, roughly speaking, limitations are imposed governing what buildings may be erected on the land and in what manner, that is, the use of land for building purposes is regulated. In rural zoning, limitations will be put upon the type of agronomy which may be carried on upon the land, that is, the use of land for agronomic purposes will be regulated. As between the two cases there is an identity as to the basic object regulated and a difference merely in their respective designs, resulting from the difference in the general use to which land is put in cities and that to which it is put in the country -- in cities, land is used on which to erect buildings; in the country, land is used on which to grow things.

Zoning and Analogous Measures Without City Limits

There is nothing to make of city limits a boundary for zoning. Rural territory is not per se any more immune from proper regulation than urban territory. The so-called "urban type" of zoning has been applied in territory outside the limits of cities -- in territory toward which urban development is trending, and in order to protect such development -- and is not questioned. 5/

3/ Harlean James, Land Planning in the United States for the City, State and Nation (1935), p. 231.

4/ Issued by the United States Department of Commerce, 1922.

5/ Western Springs v. Bernhagen, 326 Ill. 100; Gordon v. Commissioners of Montgomery County, 164 Atl. 676 (Md. 1933); San Mateo County Planning Commission, The Subdivision of Land in San Mateo County, California (1932); Freund, in 24 Ill. L. R. (1929), p.135; Hugh R. Pomeroy, "County Zoning Under the California Planning Act", Annals of the American Academy, Vol. 155, pt. II (May 1931), pp. 47-59; L. Deming Tilton, "Regulating Land Uses in the County", ibid, pp. 123-136. Eighteen counties (in California, Virginia, Maryland, Georgia and Illinois) having zoning ordinances as of January 1, 1936, are listed in Hendrickson, County Planning and Zoning (mimeo. June, 1936, U.S.D.A.), p. 24. For a list and discussion of State zoning enabling acts for extra-urban territory, see Land-Use Planning Publication No. 10, Part I, Section 3.

Zoning has been classically defined as "The creation by law of districts in which regulations, differing in different districts, prohibit injurious or unsuitable structures and uses of structures and land." 6/ Now, districts within which police power regulations peculiar to the district are applied have been frequently created in rural areas. There exist and have existed almost numberless irrigation districts, conservancy districts, levee districts, drainage districts, grazing districts, and so on, each one with a separateness of regulation. Within the same State or even county there commonly exist districts of two or more different types, in each of which the type of regulation is different from that in another.

Some cases of special appositeness here may at this point be cited. In Bacon v. Walker the Federal Supreme Court upheld a law creating zones two miles in radius around the dwelling of the owner of a "possessory claim", within which the herding of sheep was prohibited.7/ In Pyramid Land and Stock Co. v. Pierce an analogous Nevada law was upheld. 8/ In Perley v. North Carolina there was sustained a statute creating zones of the area within 400 feet of any watershed owned by any city or town for its water supply, and requiring private land owners within such zones to remove all waste timber not desired for commercial or other purposes. 9/ In Bountiful City v. De Luca a city ordinance was upheld which established a zone of the land within 300 feet of the stream from which it drew its water supply, and forbade stock-owners to allow their animals to run at large therein. 10/ The legislation (sustained by the courts) requiring the destruction of cedar trees to prevent the spread of cedar rust to apple orchards has commonly established a zone (of a one, two or three mile radius) around apple orchards, in which such destruction is compulsory. 11/ Indeed, in one such case, the court referred to the measure as "something in the nature of rural zoning."12/

6/ E. M. Bassett, "The Principles of Zoning" (in: American Civic Association Zoning, ser. II, No. 14, June 30, 1920), p. 9.
7/ 204 U. S. 311 (1907).
8/ 95 Pac. 210 (1908).
9/ 249 U. S. 510 (1919).
10/ 292 Pac. 194 (Utah, 1930).
11/ For example: Miller v. Schoene, 276 U. S. 272 (1928); Lemon v. Runsey, 108 W. Va. 242 (1929).
12/ Upton v. Felton, 4 Fed. Sup. 585, 589 (1932).

The Police Power in General Substantively Considered

The substantive measures adopted under the rubric "rural zoning" would be in pursuance of the so-called police power of the State. The exercise of the police power involves restriction, without compensation, on private property and individual freedom in the interests of a paramount common good. Traditionally, the police power was said to be the power of State to protect the health, safety and morals of the community. Latterly, there has been added to this concept another, which goes beyond the ambit of health, safety and morals, namely, "the promotion of the general welfare". 13/ Although there are still some courts which are reluctant to go beyond the consideration of the public "health, safety and morals" in accepting police power regulations, 14/ the great body of court opinion has progressed so far beyond the traditional way of viewing the police power that land-use zoning should be able to stand even as a measure purely of economic control in the interests of the general welfare, quite apart from consideration of health, morals and safety. "The assumption that the police power extends only to the health, safety, and morals of the public, which was at one time quite general, is now out of date. The modern view is that the State may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded

13/ The late Professor Freund, in an article appearing in 1929 (24 Ill. L. R. 135, @ 137), found serious theoretical objections to basing zoning on "general welfare" and the other usual criteria of the police power. In his opinion, zoning (which he favored) presents a special legal problem looking to a totally different object from those usually associated with health, safety, morals and general welfare; and for this reason, he thought that zoning should for its own good find a new basis. Nevertheless, Freund, as he himself well realized, was criticizing (incorrectly or not) the reasoning of the courts from a theoretical standpoint. Despite his admonitions, the courts have continued to treat zoning in the health-safety-morals-general-welfare framework of the police power. This is what is to be anticipated.

14/ See, for example: Tighe v. Osborne, 149 Md. 349 (1925); Mayor of Wilmington v. Turk, 14 Del. Ch. 332 (1925). In such cases, however, the courts frequently go to great extremes to justify a measure within the traditional frame. See, for instance: Board of Hudson River Regulating District v. Fonda J. & G. R. R. Co., 249 N. Y. 445 (1928), and appealed cases. The obvious conclusion is that every possible relation of rural land-use zoning to health, morals and safety ought to be exhibited by counsel in presenting zoning cases to the courts.

as adapted to promoting the common welfare, convenience, and prosperity." 15/ Cases to this effect are numerously cited at appropriate places below. Suffice it to say that, in favor of the principle that the police power extends as indicated, stands the opinion not only of the bulk of the State courts but that as well of the Federal Supreme Court, the highest tribunal of the land.

Just what the "general welfare" signifies is not precisely delineated, and the courts do not follow rigid standards in ascertaining whether the general welfare has, or has not, been promoted by a particular law. The criteria are general ones, depending on the situation; 16/ and the declaration of the legislature, while not conclusive, is accorded the greatest respect. 17/

The Objects of Rural Zoning Putting it Within Valid Purview of Police Power

The presumption is that rural zoning for land-use would be in the interests of the general welfare. Specifically, the achievement through zoning of the purposes hereinafter discussed would be a promotion of it.

(1) The conservation of the State's resources in land and land values. In the case of Tulare Irrigation District v. Lindsay-Strathmore Irrigation District 18/ the court, in answer to an assertion that the legislature was without authority to abridge or destroy vested riparian rights, declared:

> "That the protection and conservation of the natural resources of the state is in the general welfare and serves a public purpose, and so constitutes a reasonable exercise of the police power, is now so well settled that no further citation of authority is necessary."

In eroded areas, or areas likely to erode, the purpose would be the conservation of the lands themselves. In other areas as well, soil conservation purposes of a larger aspect than merely erosion con-

15/ State v. Wilson, 101 Kan. 789, 794-95 (1917). Another very quotable statement is found in Miller v. Board, 195 Cal. 477, 484-5 (1925).

16/ Infra, p. 43.

17/ City of Providence v. Stephens, 163 Atl. 614 (R. I. 1926); Lawton v. Steele, 152 U. S. 133; People v. Gilbert, 207 N. Y. 369; Block v. Hirsh, 256 U. S. 135; infra, p. 43.

18/ 45 Pac. (2nd) 972, 988 (Cal. 1935).

trol would be in view. Under zoning, the destructive breaking up of virgin sod, and the future unwise cropping of land once abandoned, could be prevented and improper utilization in general could be discouraged. Soil destructive practices would thus be curbed and soil conserving practices promoted. This is in essence the purpose of the Standard State Soil Conservation Act; and we here simply refer to Section I of the opinion on the constitutionality of that act, without attempting again to go over ground which has already been covered. 19/ To the cases there discussed might, however, be added Canadian River Gas Co. v. Terrell. 20/

Special attention should, furthermore, be directed to an Opinion of the Justices of Maine's Supreme Court, on the question of a proposed statute concerning the regulation of the cutting or destruction of trees growing on wild or uncultivated land, wherein it was pointed out that, for one thing, the total amount of land is incapable of increase, and if owners could waste land without any State restriction, "the State and its people may be helplessly impoverished and one great

19/ A Standard State Soil Conservation Districts Law (U. S. Department of Agriculture, 1936), pp. 39 et seq.

20/ The court said in this case (upholding a Texas statute directed to conserving gas): "Under the property rules in force in various states, such as Del., Okla., Ky., Cal., and others, a landowner has no absolute title to oil or gas in place, but has only the right to acquire title upon reducing such minerals to possession. This doctrine has been expressly denied in Texas, and it has long been the settled law of the State that the landowner holds title to the oil and gas underlying his land in place, and that he has the right to withdraw same from the ground by mining operations, and that the fact that in so doing he may incidentally appropriate some of the oil or gas underlying his neighbor's ground does not deprive him of that right . . . However, it is well established by the decisions of the federal courts in Texas that, notwithstanding this prevailing rule of property, the State has the power to regulate the use of its natural resources so as to prevent their waste." 4 Fed. Sup. 222, 226 (1933).

Add, further: Arkansas Fuel Oil Co. v. Reprimo Oil Co., 91 S. W. (2nd) 381 (1936, Tex. Civ. App.).; Mendiola v. Graham, 10 Pac. (2nd) 911 (Ore. 1932); F. C. Henderson v. R. R. Commission of Texas, 56 Fed. (2nd) 218 (1932); Amazon Petroleum Corp. v. R. R. Commission of Texas, 5 Fed. Supp. 633 (1934); Gin S. Chow v. City of Santa Barbara, 22 Pac. (2nd) 5 (particularly @ p. 17).

purpose of government defeated." 21/ One should be able to make a particularly strong case that land is a natural resource, and as such might be subjected to conservatory measures, in States where the livelihood of the State is largely dependent on the land. Beyond this, the entire subject of conservation as it relates to this study may be gone into with more detail.

That the misuse of land which a rural land-use zoning program would seek to obviate has resulted in serious deterioration of land value is a fact well known. However, it would be [illegible] to adduce statistics to portray this fact graphically and with [illegible] For example, according to a recent estimate, approximately [illegible]0,000 acres of good land have been essentially ruined through [illegible], and 50,000,000 additional acres are in almost as serious a condition. 22/ In part, it is to prevent further deterioration of this sort, and to aid in the recovery of already deteriorated lands, that zoning is enacted. It is obvious that the attainment of such an end would have a very material relation to the general prosperity; and it is now well established that the promotion of the general prosperity is validly an object of the police power. 23/

21/ 103 Maine 506, 511 (1907). See also: Pyramid Land and Stock Co. v. Pierce, 95 Pac. 210.

22/ A. B. Perkins and J. R. Whitaker (ed): Our Natural Resources and Their Conservation (N. Y., 1936), p. 75.

23/ Pettis v. Alpha Alpha Chapter of Psi Beta Pi, 215 N. W. 835 (Neb. 1927); County of Los Angeles v. Spencer, 126 Cal. 670 (1899); Graham v. Kingwill, 54 Pac. (2nd) 408; Wolfsohn v. Burden, 241 N. Y. 288 (1925); Max Factor & Co. v. Kunsman, 55 Pac. (2nd) 177 (Cal. 1936); Arkansas Fuel Oil Co. v. Reprimo Oil Co., 91 S. W. (2nd) 381; State ex rel Carter v. Harper, 182 Wisc. 148; Windsor v. Whitney, 95 Conn. 357 (1920); State v. Wilson, 101 Kan. 789 (1917); Sabatini v. Andrews, 243 App. Div. 109 (N. Y. 1934); California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. (2nd) 555 (1934 aff'd. 55 Sup. Ct. 725); Women's Kansas City St. Andrew Society v. Kansas City, 58 Fed. (2nd) 503, (C.C.A. 1932); Detweiler v. Welch, 46 Fed. (2nd) 75; Chi. B. & Q. R. R. v. Drainage Commission, 200 U. S. 561 (1906); Bacon v. Walker, 204 U. S. 311 (1907); Eubank v. Richmond, 226 U. S. 137 (1912); Sligh v. Kirkwood, 237 U. S. 52 (1915).

More specifically on the point, in Fallbrook Irr. District v. Bradley, wherein the United States Supreme Court declared the irrigation of "really arid land" to be a "public purpose", it was said:

> "Millions of acres of land otherwise cultivable must (lacking irrigation) be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advancement of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State." 24/

Court doctrine on the promotion of the economic welfare through measures aiding the land has undergone a development. Such measures originally had to find their justification in considerations of public health. In 1898, for example, the Missouri Supreme Court declared:

> "This law (i. e., a drainage statute) would be unconstitutional if its only purpose and effect was to improve the value of the lands of the persons in the district; but such is not the only object of the law. We take judicial note of the fact that overflows are followed by disease." 25/

This restricted view of the matter was altered by the same court thirteen years later, in a case upholding a statute designed purely for the economic purpose of rendering lands fit for cultivation and habitation; and the court made it explicit that such grounds alone were sufficient to make the act valid. It said, inter alia:

24/ 164 U. S. 112, 161, 164 (1896). Here it was a question of drainage ditch assessments. The court had to determine whether the objects of the drainage district constituted a public purpose sufficient to justify the assessment of those lands which benefited comparatively little from the drainage. Such assessments are generally considered under the police power rather than under taxation.

25/ Morrison v. Morey, 146 Mo. 543, 563.

> "The right of a State, in the exercise of the police power, to drain lands for the purpose of protecting the health of the people is generally conceded, and if such power may be invoked to protect the health of the people inhabiting swamp and overflowed lands, it may also be invoked to make such lands fit for use, productive and habitable . . ." 26/

This economic viewpoint was again confirmed by the Supreme Court of the United States, in O'Neill v. Leamer: 27/

> "It has been held that it is not necessary that the state power should rest simply upon the ground that the undertaking is needed for the public health; there are manifestly other considerations of public advantage in providing a general plan of reclamation by which wet lands throughout the state may be opened to profitable use."

Shortly after the Morrison v. Morey case, the United States Supreme Court had, moreover, given its opinion in the frequently cited and quoted Chicago B. & Q. Ry. Co. v. Illinois. 28/ Here an Illinois statute providing compulsory drainage of cultivable lands at individual expense was sustained; and the court quoted with approval the words of the Illinois Supreme Court in this case to the effect that the increase of land values can be legitimately promoted through police power regulations. 29/ This quotation was especially significant, inasmuch as it apparently amounted to denial of a contrary contention advanced by the C. B. & Q. Ry. counsel, namely, that the police power could not be employed "simply to enhance the value of private property". 30/ Other cases in which the idea of protecting or increasing land value seems to be the real reason for

26/ Little River Dr. Dist. v. R. R., 236 Mo. 94, 111-12 (1911).
27/ 239 U. S. 244, 253, (1915).
28/ 200 U. S. 561 (1906).
29/ See further on this case, infra. p. 12.
30/ Brief of counsel for the C. B. & Q. Ry., appellants, p. 39.

the enactment of legislation might be cited. 31/ The measures applied in all these cases had to do with irrigation, drainage or flood control. In zoning is found the same intent to conserve land values, but achieved by a different method, appropriate to the circumstances of the case.

In Windsor v. Whitney a planning measure which placed restrictions on the use of real estate was justified, inter alia, in view of enhancing the value of property. 32/ Specifically for zoning, the New York Court of Appeals, in a leading case, sustained a municipal zoning ordinance on the ground, among others, that it would prevent the "impairment of property values devoted to private residences". 33/ Other zoning cases have contained similar viewpoints. 34/

The cases just discussed fell into two classes. There were, first, compulsory land improvement cases of the sort generally known as "joint or common improvements," being improvements which benefited more than one person at a time. The theory behind these cases was that all landowners involved can be compelled to contribute to improvements beyond the scope of any one owner, to the end that all might individually benefit. There were, secondly, city zoning cases, in which individual property values were protected from the intrusion of outside injurious influences. It was here not a case of an individual being prohibited from engaging in uses harmful to his own property, but rather of preventing him from engaging in a use harmful to the property of his neighbors.

The conservatory objective of rural zoning is the same as that of these two classes of cases, and its method in part bears analogies to their methods. Nevertheless, rural zoning is also partly different in method from each of them. It is different from the first in that it

31/ O'Reiley v. Kankakee Valley Ir. Co., 32 Ind. 169 (1869); Missouri - K.-T. R. Co. v. Rockwell County L. I. Dist. No. 3, 297 S. W. 206 (Tex. 1927); State v. Board of County Commissioners of Polk County, 87 Minn. 325, 335; Houck v. Little River Dist., 239 U. S. 254, 261 (1915); Norfleet v. Cromwell, 70 N. C. 634, 638-9 (1874); Rutherford v. Maynes, 97 Pa. St. 78, 83 (1881); Tidewater Co. v. Coster, 18 N. J. Eq. 518 (1866); Merrick v. Amherst, 94 Mass. 500 (1866).

32/ 95 Conn. 357, 365 (1920).

33/ Wulfsohn v. Burden, 241 N. Y. 288, 301 (1925).

34/ Spencer-Sturla Co. v. City of Memphis, 290 S. W. 608 (Tenn. 1927); Call Bond & Mortgage Co. v. Sioux City, 259 N. W. 33 (Iowa, 1935); White v. Luquire Funeral Home, 221 Ala. 440, 443 (1930); Buckley v. Baldwin, 230 App. Div. 245 (N. Y. 1930); State v. McDonald, 168 La.172 (1929); State v. New Orleans, 154 La. 271; State v. Houghton, 164 Minn. 146 (1925). See Landels on Zoning, A.B.A. Journal, vol. XVII, p. 163, 165.

is not a case of "joint or common improvement". It is different from the second in that it is a case of preventing an individual from doing a certain harmful act to his own property rather than of preventing him from performing an act which harms another's property. 35/

Measures with this characteristic of rural zoning were discussed by the late Professor Freund in a section of his book on the police power entitled "Compulsory Industry and Improvement." At the time his monumental book was published (1904), there was no State legislation of such character in existence. The only case which Freund thought pertinent to discuss on the point was an 1833 Kentucky case, Gaines v. Buford, involving the right of the State to compel forfeiture of unconditionally granted land on account of failure to carry out improvements under a subsequent statute. Justice Nicholas, one of the two judges sitting in the case, wrote in his opinion that he was not prepared to say that the government was without power to control "the proprietor of the land in its use or non-use, or in the mode of its use." 36/ The statement with which Freund himself ends his discussion is:

> "It is not impossible that with regard to some forms of property and especially with regard to land, the courts may come to recognize such an exercise of the police power, if practical methods can be devised of enforcing . . ." 37/

There is yet another type of police power case which bears a close analogy to "compulsory improvement" not of a joint nature, a concrete example of which is furnished by Leavitt v. City of Morris, wherein was upheld a Minnesota statute providing for compulsory commitment of inebriates to a State hospital farm, in order to protect the interests of such inebriates (as well as those of the State) and to restore to them their self-possession. 38/

The element of the compulsory benefit to the individual as such should, however, be thought of in this connection only incidentally. The primary public interests are in other aspects of the matter. By preventing an individual from engaging in types of land-use foredoomed to failure, the State will reduce the likelihood of having to carry him on the relief rolls as a consequence of his impoverishment. When the State has assumed the obligation to provide relief, it has some right to pass measures calculated to reduce the likelihood that

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35/ This element of prevention of harm to the property of others is, of course, often present in rural zoning, as will be indicated.
36/ 31 Ky. 481, 504.
37/ Freund on the Police Power, p. 467.
38/ 105 Minn. 170 (1908).

public moneys will have to be spent for this unremunerative purpose. The public interest in land conservation is seen also incidentally, in its relation to forest and water conservation, flood control and drainage, wildlife protection, the fostering of the State's industries, and the conservation of the food supply. Even more, however, the public has an interest in protecting the sources of governmental revenues -- otherwise stated, of protecting the tax base.

(2) The protection and strengthening of the tax base. The protection and strengthening of the tax base (and its converse, the effectuating of public economies) has not been hitherto particularly thought of in connection with the exercise of the police power. The simple lack of a great array of material, however, such as may be marshaled for other points, does not signify that such an object is not a proper one. Hitherto the nation has been engaged in tapping its immense resources. The national income has been constantly and enormously expanding. Hence there has been no special problem of strengthening or protecting the sources of revenue, with which the government finances the functions which it performs for the benefit of society; and the attentions of the governments have accordingly had little occasion to be directed to it. The state of the national income and the burden of public outlays, however, may in the future be expected to necessitate a closer attention to this matter.

"It costs something to be governed," said Mr. Justice McKenna; 39/ and Justice Field once alluded to the fact that "the necessity of revenue for the support of the government does not admit of . . . delays." 40/

Judicial doctrine on the point is not entirely lacking. An important case, of use here, is Chicago B. & Q. Ry. Co. v. Illinois, in which the exercise of the State's police power to cause the drainage of lands was judicially sustained in a "contest between certain Drainage Commissioners in Illinois and the C. B. & Q. Ry. Co., as to the validity of a demand made by the former that the latter should remove the bridge and culvert now maintained by it over Rob Roy Creek". 41/ In passing on this contest, the federal Supreme Court said that:

> "We assume . . . without discussion . . . as from the decisions of the state court we may properly assume -- that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the state may by appropriate agencies exert the

39/ Merrick v. Halsey and Co., 242 U. S. 568, 587.
40/ Hagar v. Reclamation District, 111 U. S. 701, 708 (1884).
41/ 200 U. S. 561, 585 (1906). See supra, p. 6.

> general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by the 'subjection of such lands to cultivation', 'they are made to bear their proportionate burden to the support of the inhabitants and commerce of the State. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased.'"

The court reiterated its view, in the next sentence, by referring again to "this public purpose." Here, then, from the point of view of the State, police power measures were properly enforced in order that privately-owned lands might be made more lucrative for the State's treasury. From other drainage and irrigation cases can be drawn materials for the same argument, showing that the courts have on occasion given favorable reflections to it. 42/

If the State may adopt measures for the enhancing of private taxable values, it may by the same token take preventive measures to protect the tax base from deteriorating or being destroyed. Zoning is a measure which will act precisely to this end. In the case of Colby v. Board, wherein it was a question of prohibiting the further intrusion of brick kilns in a district which had been declared residential, the court was aware of the problem and the relation of zoning to it. In the district an old kiln had already existed [in a non-conforming use]; and the court appeared considerably impressed by the fact that "land values in the neighborhood have been so destroyed by its presence as to result in many unredeemed tax sales." 43/ "The loss [from harmful uses of property] is not only to the owners, but to the state and municipality by reason of the diminished taxes resulting from diminished values." 44/ It was remarked in the Opinion on the constitutionality of the Standard Soil Conservation Law, in connection with measures looking to the conservation of gas and petroleum, that "the courts are particularly apt to sustain such regulation where the well-being and prosperity of the entire community is involved, as in cases where the oil industry

42/ Round City Land and Stock Co. v. Miller, 170 Ia. 244, 251 (1902); In re County Ditch [ ], 142 Minn. 67, 71-2 (1919); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 368-9 (1888). For a measure more specifically regulating land-use: Pyramid Land and Stock Co. v. Pierce, 8 Pac. 210, 216 (Nev. 1907), cited with approval by In re Calve, 253 Pac. 631.

43/ 81 Colo. 344, 349 (1927).

44/ State ex rel Twin City Bldg. & Invest. Co. v. Houghton, 144 Minn. 1, 19 (1920). See also: Opinion of the Justices, 176 Mass. 606.

is one of the principal industries of the State and the State derives large revenue from the taxation of that industry." 45/ One should be able to make the same remark of the conservation of land values in a situation in which the livelihood of a large part of the people is dependent on the land, and the State and local governments dependent on real property taxes for a large share of their income.

Chronic tax-delinquency situations, bond defaults and the exhausted state of the public treasury in many sections of the country are eloquent testimony to the necessity of measures designed to protect and strengthen the source from which public revenue -- "without which the State could not exist" 46/ -- are drawn. In many situations, wherever, and insofar as the unwanted state of affairs is attributable to misuses of the land correctable through zoning, rural land-use zoning can both prevent the further weakening, and promote the future strengthening, of the tax base.

(3) Forest conservation; flood control and drainage, conservation of water, game, fish and natural scenery:

> "Timber also is a natural resource which states have sought to protect and in connection with which the actions of state legislatures have been on the whole upheld by the state judiciaries. It seems necessary to cite here only a few cases, which, in their procedure and on their facts, come closest to the soil conservation program. The owner of forest land is frequently obligated by statute to patrol his own lands with a view to removing brush, debris, etc. likely to cause fires, etc. In the event of his failure to provide such a patrol, the state forester was to furnish the patrol and the state forester's expenses were to be extended on the assessment rolls of the county and collected in the same manner and time as taxes. The state forester was then to be repaid from these receipts. This procedure, as has been indicated above, was held not to involve the imposition of a tax but the collection of an indebtedness imposed under the police power of the state. Such statutes have been sustained in First State Bank of Sutherland v. Kendall Lumber Corporation, 107 Ore. 1, 213 Pac. 142 (1923); Chambers v. McColm, 272 Pac. 707 (Idaho 1908); State v. Pape, 103

45/ As cited supra, @ p. 40.
46/ Yamhill County v. Foster, 53 Ore. 124, 133.

> Wash. 319, 174 Pac. 460 (1918). Although the case of Perley v. North Carolina, 249 U. S. 510, 39 S. Ct. 357 (1919) . . . . . was directed primarily to the preservation of the water supply, the immediate way in which it was anticipated the water supply could be damaged was by forest fires denuding timberland."

Zoning would aid in the preservation and conservation of forests, grass sod, and other soil covers which in turn is of primary importance in preventing floods at their source; and thus would tend to reduce the ravages which floods wreak on land and other property, and on human health and comfort. The establishment of river regulating districts and conservancy districts to prevent and control floods has been sustained, as well as legislation directed toward assuring adequate drainage of farm lands. 48/ Zoning will be designed to the maintenance and even improvement of soil and cover conditions conducive to proper drainage; and hence these cases are in point.

The protection of the water supply would come not only as an indirect result of the measures taken to protect in general the land and timber resources, but as well through zoning for "watershed protection"; i. e., the setting aside of zones in critical areas in which all uses of the lands might be restricted for the purpose of preventing floods and too rapid run-off, and the protection of the water supply of the State in general. In some parts of the country, the scarcity of water makes its conservation particularly vital to the people, and the courts are especially liberal in their attitude toward measures which look to water conservation. This conservation of the waters of the state is of transcendant importance. Its waters are the very life blood of its existence." said the Supreme Court of California in one case. 49/ In this case, as in the case of the Tulare Irrigation District case, cited supra, the court sustained legislation which abridged vested riparian rights. It was "an endeavor on the part of the people . . . to conserve a great natural resource" and as such

47/ Ms. memorandum by Mr. Sigmund Timberg, Aug. 23, 1935, Office of the Solicitor, Land Policy Division, U. S. Dept. of Agr. This is a penetrating study of the legality of soil conservation measures. See, also, the discussion in 19 L.R.A. (N.S.), pp. 422-23 n; and Freund on the Police Power, pp. 449-50.

48/ Standard State Soil Conservation Districts Law, p. 42.

49/ Gin S. Chow v. Santa Barbara, 22 Pac. (2nd) 5, 16 (Cal. 1933).

valid. 50/

One result of comprehensive rural zoning should be the improvement of the habitat of wild game and fish, and the more adequate protection of the State's game and fish supply. In the cases of Bayside Fish Flour Co. v. Gentry; State v. Rodman; and Gentile v. State, one can find a doctrine that in protecting game and fish the State is acting to protect a natural resource on behalf of all the people of the State. 51/

> "The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens . . . ." 52/

50/ See, also: Eden Irrigation Co. v. District Court of Weber County, 61 Utah 103 (1922); Fall River Valley Irrigation District v. Mt. Shasta Power Corp., 259 Pac. 444 (1927 Cal.); Gallardo v. Porto Rico Ry., Light and Power Co., 18 Fed. (2nd) 918 (C.C.A., 1927); In re County Ditch #34, 142 Minn. 37. There are in addition other types of regulation affecting water which have a bearing on the instant problem. One might cite, for example, a number of cases upholding legislation which curbed property rights in order to prevent pollution. However, pollution is prevented in order to conserve the water for a certain purpose; and viewed this way, the cases come to have an appropriateness as measures in the interests of general water conservation. For example: Bountiful City v. De Luca, cited supra; City of New York v. Kelsey, 213 N.Y. 638 (1914); State v. Shaw, 22 Ore. 287 (1892); State v. Griffin, 69 N.H. 1(1896); Topeka Supply Co. v. City of Potwin, 43 Kan. 404 (1890); Town of Shelby v. Cleveland Mill and Power Company, 155 N. C. 196 (1911); State v. Wheeler, 44 N. J. L. 88 (1882); State v. Quattropani, 99 Vt. 360 (1926). The case of Perley v. North Carolina, 249 U.S. 510 (1919), described supra, is also much in point.

51/ 56 Sup. Ct. 513 (1936); 58 Minn. 393 (1894); 29 Ind. 409 (1868), respectively.

52/ State v. Rodman, as cited. See, further, for example: Geer v. Connecticut, 161 U.S. 519 (1896); Wm. A. Sutherland: Notes on the Constitution (1904), 128; State v. Southern Coal Co., 71 W. Va. 470 (1912); Commonwealth v. Sisson, 139 Mass. 247 (1905); Connolly v. Standard Oil Co., 264 Fed. 383 (1920); Haggerty v. Ill. Mfg. Co., 143 Mo. 238.

The conservation of natural scenery is treated at another point. 53/*

(4) The conservation of the food supply. In cases in which zoning did not prevent the use of land for the production of food (e. g., forest zones), but encouraged the use of the land to its greatest food-production efficiency, it would have a food-conserving effect. This is validly an objective of the police power.

In Bayside Fish Flour Co. v. Gentry the United States Supreme Court upheld a measure whose "plain purpose" was "simply to conserve for food the fish found within the waters of the state", although it worked to deprive a fish reduction concern of a good share of its legitimate business. 54/ In Gibson v. State, a statute prohibiting the taking of

53/ Infra, p. 25.

*The most nearly accurate descriptive term which can be used to designate the type of zoning with which this paper concerns itself is rural land productive use zoning. "Land-use zoning" may not sufficiently distinguish it from the urban-type of zoning in rural territory, since, as already explained, any zoning is essentially land-use regulation. It is the intrinsic production uses of land in rural territory that particularly concerns us here. Since this type of zoning is as yet untested in the courts, the foregoing discussion has had as its intent the piecing out from various lines of approach what would seem to be sound judicial doctrine that the purpose of zoning to conserve land and land values and other allied natural resources is a valid one. A case, however, which is sometimes cited, incorrectly, in support of the hypothesis that conservatory land-use regulations would be unconstitutional is Goodquist v. Fraser, 154 Minn. 371 (1923), in which the Minnesota Supreme Court, by a 3-2 decision, held unconstitutional a statute (Minn. Laws of 1921, Ch. 155) authorizing boards of county commissioners, on the petition of third persons, to enter upon privately owned farms, and there to clear designated sized tracts for agricultural uses, defraying the expenses of the work by the issuance of county bonds, proportionately assessing the improved lands to reimburse the county. The decision was based on an interpretation of sections 5 and 10 of Article IX of the State Constitution which provided, respectively, that the "state shall never contract any debts for works of internal improvements," and that "the credit of the state shall never be given or loaned in aid of any individual." The due process limitations on the police power were not involved, and therefore this case may not be used as an argument against rural zoning.

54/ 56 Sup. Ct. 513 (1936).

oysters less than 2-1/2 inches from hinge to mouth in size, applicable to private (as well as public) beds, was upheld, in a case provoked by the arrest of the owner of a cargo of immature oysters taken from a private bed. 55/ The court held that the statute was valid as tending to preserve the source of the oyster supply. In an earlier case, Tyler v. State, 56/ the same court had pointed out that such laws were in pursuance of two valid purposes: viz., The preservation of a valuable food supply, and the protection of an important industry (oyster-taking). 57/

(5) Fostering the State's industries. That this is within the valid exercise of the police power was declared as early as 1885 by Mr. Justice Field, speaking for the Supreme Court in the case of Barbier v. Connolly. 58/ Since then, the doctrine has received sundry affirma-

55/ 64 Atl. 288 (Md. 1906).
56/ 48 Atl. 840 (1901).
57/ "In the interest of conserving the food supply of a community, legislation requiring the destruction of cedar trees to prevent the spread of cedar rust to apple orchards has been adopted in a number of States and has been sustained: Miller v. Schoene, 276 U. S. 272 (1928); Upton v. Felton, 4 Fed. Supp. 985 (1932); Kelleher v. Schoene, 14 Fed. (2nd) 341 (1926); Kelleher v. French, 278 U. S. 563 (1928); Lemon v. Rumsey, 108 W. Va. 242 (1929). Destruction of trees to exterminate types of orchard pests other than cedar rust has also been required by State legislatures, and sustained by State supreme courts: Balch v. Glenn, 85 Kan. 735 (1911); State v. Main, 69 Conn. 123 (1897); Louisiana State Board of A. & I. v. Tanzman, 140 La. 756 (1917); Colvill v. Fox, 51 Mont. 72 (1915). Similar are the cases which have upheld the required destruction of wheat crops where corn-stalks upon which corn borers could grow were present in wheat fields: Van Gunten v. Worthley, 25 Ohio App. 496 (1927); Wallace v. Feehan, 206 Ind. 522 (1934); Wallace v. Dohner, 89 Ind. App. 416 (1929). Extensive powers to abate insect pests have been conferred upon administrative boards and sustained in Los Angeles v. Spencer, 126 Cal. 670 (1899); Graham v. Kingwell, 218 Cal. 658 (1933); Carstens v. De Sallom, 82 Wash. 645 (1914). These cases contain frequent statements that preservation of the food supply is a major valid objective of the police power." [Broken quote] (Standard State Soil Conservation Districts Law as cited, pp. 40-41). See also 152 U. S. 133, 139.
58/ 113 U. S. 27, 31.

tions from various courts. 59/ Further, from the cited opinion on the constitutionality of the Standard State Soil Conservation Districts Law can be found considerable material on the subject of measures which protect and foster various State agricultural industries or pursuits. 60/ It may be noted here that if the state is predominantly agricultural, the courts appear more readily willing to permit the use of governmental power to protect agricultural interests. 61/

(6) The stabilization of land values, and the lessening of the speculative holding of land and of the evils of land speculative schemes is of public interest. Where there is proper zoning, land prices will be less subject to vagaries, and this consideration might carry some weight with the courts. In a leading case, State ex rel Carter v. Harper, the Wisconsin Supreme Court listed the stabilization of the value of property among the ends justifying city zoning, 62/ and when the Supreme Judicial Court of Massachusetts declared, in Kane v. Board of Appeal of Medford, that the legitimate design of city zoning is "to stabilize property uses", 63/ there is the implication that the stabilization of values is a corollary.

Zoning should in a measure protect the public against highly speculative land promotion schemes. For example, grazing lands which are unfit for agriculture and have been zoned accordingly would not be open to sale as farming lands at exaggerated prices by high-pressure salesmen. Mr. Justice Holmes once wrote that the policy of restricting extraordinary "profits from a national misfortune" had been accepted. 64/ An analogy might be made to the case of profits derived from selling land under misrepresentation. "The prevention of deception is within the compe-

59/ For example: Tyler v. State, 48 Atl. 849; County of Los Angeles v. Spencer, 126 Cal. 670 (1899); Graham & Kingswell, 213 Cal. 658 (1933); Sligh v. Kirkwood, 237 U. S. 52 (1915) (protecting the citrus industry); Detweiler v. Welch, 46 Fed. (2nd) 75, affirming 46 Fed. (2nd) 71; Ex parte Mofford, 299 Pac. 58 (1931) (protecting the fruit, nut and vegetable industry of California); People v. Perretta, 253 N. Y. 305 (1930) (encouraging the production of milk); Pyramid Land & Stock Co. v. Pierce, 95 Pac. 910 (Nev. 1908) (protecting stock-raising); Bacon v. Walker, cited supra (preserving the cattle industry against the encroachment of sheep). See, also: Potlatch Lumber Co. v. Peterman, 12 Ida. 769; Hansen v. City of Lowell, 43 N. E. 176 (Mass. 1896).

60/ Standard State Soil Conservation Districts Law, p. 41.

61/ See, Standard State Soil Conservation Districts Law, p. 41; and Chi., B. & Q. Ry. Co. v. Ill., 200 U. S. 561 (1906).

62/ 182 Wisc. 148, 153 (1923).

63/ 273 Mass. 97, 104 (1930).

64/ Block v. Hirsh, 256 U. S. 135, 157 (1921).

tency of government". 65/

Apart from the foregoing, there is a public interest in factors connected with the redirection through zoning of the pattern of occupancy. These will now be treated.

(7) The effectuation of economies in public expenditures for roads, schools, relief and other public services. This is another aspect of the public finance argument, as already treated above under the rubric: "protecting the tax base."

The public finance argument is especially cogent on the practical plane. For the taxpayer, "public economies" is the most convincing of all public welfare considerations. Through zoning, the economies come in two ways: first, in directing the pattern of occupancy; and, second, in bringing it about that fewer farmers are thrown on the relief rolls, impoverished. Only the former here needs further consideration, since the latter has already been touched upon. 66/ According to Mr. W. A. Rowlands, the most pressing reason for zoning in the counties of northern Wisconsin has been the financial, the consequence of isolated settlement. 67/ In forested areas, fire prevention and protection is rendered more expensive by the presence of scattered settlers, who undeniably create fire hazards. A like argument can be made regarding the enforcement of the laws. Again, and more importantly, the demands made by isolated settlers for road and school facilities

65/ McKenna, J., in Hall v. Geiger-Jones Co., 242 U. S. 539, 551 (1917). See: Barnhill v. Young, 46 Fed. (2nd) 804 (1931); Freund Ch. XI; Merrick v. Halsey, 242 U. S. 568; Corn Products Refining Co. v. Eddy, 249 U. S. 427. Cf. People v. Pace, 238 Pac. 1089 (Cal. App. 1925).
Forty-seven states (the only exception being Nevada, of less than 80,000 population) now have on their statute books various "blue sky laws", forty-three of which go beyond the so-called "fraud type". Stocks & Bonds Law Service, Vol. III, pp. 28-39, State Government, issue of March, 1936, p. 58. In this connection, it may be of interest to note Administrative Rule No. 14, followed by the Georgia Dept. of State, in administering the Georgia Blue-Sky Law: "Experience demonstrating that very small orchard or farm units cannot be successfully operated by their owners, the Secretary of State will not consider an application (to license a real estate broker) to sell orchard units or farms in less than tracts of 10 acres, except that trucking units of not less than 5 acres may be sold". Georgia Securities Law (as amended 1933), printed by the Georgia Secretary of State, p. 24.

66/ Supra, p. 12.

67/ County Zoning in Wisconsin (stencil circular No. 154, November, 1934, Ext. Ser. Coll. of Agr. University of Wisconsin).

necessitate outlays of public funds out of all proportion to what taxes, if any, are paid in by them. Numerous examples of this have been given elsewhere. 68/ If the government has to provide equal schooling, roads and other public services, it has correlatively some right, as well as obligation, to see to it that its outlays for these purposes are not out of reason with relation to particular individuals. Zoning is in such circumstances a remedial measure of considerable potentialities; and it is this that has made of the Wisconsin Taxpayers' Alliance so enthusiastic an advocate of rural zoning. 69/ Under it, areas unfit for settlement would be closed thereto; the financial problem which arises from future scattered and isolated settlement would be obviated, and that which has already arisen would receive a valuable aid in its solution.

Useful legal materials for the public-economics thesis, showing that its principle is not new-fangled in jurisprudence, are obtainable from legislation relating to paupers. The legislation referred to, while it takes various forms, is designed to relieve the public treasury from a burden: that of supporting the indigent. Pauper laws are of ancient origin, going back at least to the "Statute of Elizabeth". In a whole line of cases arising under such laws, their constitutionality was always taken for granted, there having been patently no doubt as to that. 70/ It is true that there were moral reasons which prompted that the support of paupers should be thrown perforce, wherever possible, on the shoulders of relatives. But an even more underlying moral reason was the feeling that paupers were due any support at all -- by the government when there was no one else. "At common law there is no legal liability resting on one relative to support another . . . The duty of providing such support is purely statutory." 71/ The State changed the common law.

However, the moral consideration is not what is for us important. The important thing is that the government imposed personal obligations in order to relieve itself of the expense of supporting someone. In the first (and apparently only) case in which a statute imposing a

68/ See, for example: Second Biennial Report of the Minnesota State Dept. of Conservation (1934), p.9; Hendrickson, Rural Zoning (mimeo., Aug. 1935, U.S.D.A.); various studies by Professor Wehrwein; the cited issues of The Wisconsin Taxpayer; the cited article by Rowlands.

69/ See, for example, the issues of its organ, The Wisconsin Taxpayer, for August 1, 1933, and November 15, 1935.

70/ Walbridge v. Walbridge, 46 Vt. 617 (1874); Stilson v. Gibbs, 53 Mich. 280 (1884); Board of County Commissioners v. Robertson, 79 Minn. 387 (1900); Fairhaven v. Rowland, 210 Mass. 149 (1912); Fitzgerald v. Fletcher, 48 Neb. 852 (1896); Jasper County v. Osborne, 68 Iowa 208 (1882). (All being cases regarding the support, or reimbursement for public support, by relatives).

71/ Multnomah County v. Poling, 49 Ore. 603, 604 (1907).

liability to support indigent relatives was assailed as unconstitutional, the court refused to interfere, declaring squarely that its object was "to protect the public from loss," and as such was valid. 72/ The element of the duty of relatives is entirely absent from other pauper legislation, equally designed to relieve the public treasury of a burden. 73/ Again, the constitutionality of such a statute was always taken for granted.

According to Freund, the Supreme Court of the United States, for its part, has "repeatedly intimated, though not directly decided" that such measures are valid police regulations consonant with both due process and the supremacy of Congress in matters of immigration. 74/ At any rate, Justice Barbour, in delivering the opinion of this Court in City of New York v. Miln, upholding a New York law requiring that ship masters must within 24 hours after docking give a prescribed report on all passengers landed, said:

> "New York, from her particular situation is . . . exposed to the evils of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil; they have endeavored to do so, by passing, among other things, the section of the law in question. We would, upon principle, say that it had a right to do so." 75/

And the Supreme Court of California in State v. S. S. Constitution declared:

72/ People v. Hill, 36 L.R.A.634 and note, an 1896 Illinois case (163 Ill. 186).

73/ Lovell v. Seeback, 45 Minn. 465 (1891); Commissioners of Pitkin v. Law, 33 Pac. 143 (Colo. 1893); Sullivan County v. Grafton County, 55 N. H. 339 (1875); Foster v. Cronkhite, 35 N. Y. 139 (1866); Town of Barnet v. Ray, 33 Vt. 205; (all involving the interpretation of a statute throwing the burden of support on the county of domicile). State v. Benton, 18 N. H. 47 (1846); Winfield v. Mapes, 4 Denio (N. Y.) 571 (1847); Town of Barnet v. Whitcher, 50 Vt. 170; (all involving the interpretation of statutes imposing penalties on persons bringing paupers into the state for the purpose of making them public charges).

74/ Freund on the Police Power (1904), p. 259.

75/ 11 Pet. 102, 141 (1837). See, also Henderson v. Mayor of New York, 92 U. S. 259 (1875), for legislation passing the permissible bounds of interference with congressional prerogatives.

> " . . . it has never been doubted that a state has the power, by proper police and sanitary regulations, to exclude from its limits paupers . . . infirm and disabled persons, who were liable to become a public charge, or to admit them only on such terms as would prevent the State from being burdened by their support." 76/

There are a number of cases, not involving paupers, to the same intent, and squaring with the particular type of legislation here envisaged. In one of the earliest "cases" testing (favorably) the constitutionality of comprehensive urban zoning, financial savings in the matter of the construction and repair of streets finds place in the enumeration of justificatory objects. 77/ "Considerations of economic administration in the matter of police and fire protection, street paving, etc.," figured prominently in disposing the Louisiana Supreme Court favorably toward the principle of urban zoning. 78/ The same is to be remarked of the Oregon Supreme Court. 79/ Although the Court of Chancery of the State of Delaware has taken issue with this doctrine, 80/ the Federal Supreme Court, speaking through Mr. Justice Sutherland, would accept it, in quoting the pertinent passage from the Louisiana opinion. 81/

(8) The facilitation of police, fire and health protection, of the preservation of the public peace, safety and comfort, and of better recreational opportunities. The protection of the public peace, safety, and health has constituted a traditional object of the exercise of the police power, and need not be elucidated further here. Isolated settlement, which rural zoning would curb, entails a number of maladjustments menacing to public health, order and safety. Surveillance is much more difficult in areas of scattered and isolated settlement than in more populous areas. Poaching, cattle and timber thievery, forest incendiarism, bootlegging, running contraband, evasion of the authorities of the law, and other forms of lawlessness are given greater opportunities and may

76/ 42 Cal. 578, 584-5 (1872).
77/ Opinion of the Justices, 234 Mass. 597, 611 (1920). The view here expressed was cited with approval by the Supreme Court of Kansas. Ware v. Wichita, 115 Kan. 163, 167 (1925).
78/ State ex rel Civello v. City of New Orleans, 154 La. 271, 282-3 (1923).
79/ Kroner v. City of Portland, 116 Ore. 171, 182 (1925).
80/ Mayor of Wilmington v. Turl, 14 Del. Ch. 392 (1926).
81/ Euclid Village v. Ambler Realty Co., 272 U. S. 365, 388 (1926). In Ward's Appeal, 289 Pa. 451, 463-4 (1927), the Euclid case was quoted to the same effect. See further: Lynwood Land & Stock Co. v. Lacey, 95 Pac. 210, 216 (Nov. 1908).

be carried on with greater ease. The people are more difficult of access to medical care and to the public health authorities. Sanitary regulations are more difficult to enforce, and contagious diseases sometimes find an incubating ground in, and spread from, isolated families because they remain undetected.

The question here is whether measures for health and order of the same type as rural zoning may be adopted. Zoning would be of the nature of prevention rather than of suppression. That measures for the purpose of so regulating circumstances that the possibility of the evil's arising is reduced or destroyed, may be valid, is fairly apparent. A leading case for health measures is Jacobson v. Massachusetts, upholding a compulsory vaccination statute. 82/ For the preservation of the public order, the case of Omaechevarria v. Idaho 83/ is in point. Here an Idaho Statute prohibiting the grazing of sheep on range previously occupied by cattle was upheld, as a measure designed solely to avert clashes between cattlemen and sheepmen, and thus to keep the peace and save lives. It was pointed out that the sparseness of the population on the ranges made policing quite difficult. A similar, but not so exclusive, rationale is to be found in the reasoning of the court in a prior Nevada case. 84/ In Harbison v. Knoxville Iron Co., a Tennessee statute was upheld which required the payoff in cash within 30 days after issue of all scrip, coupons, etc., issued as wages, for the reason that, in addition to ameliorating the employees' condition, it was calculated to promote the peace and good order and to lessen the tendency to strife and violence in certain departments of trade and business. 85/ This holding received the approval of the United States Supreme Court. 86/ The measures here sustained put restrictions on private property and liberty, for the object of making environmental conditions less conducive to infractions of the law. This is just what zoning seeks to do.

In urban zoning, the courts have, in a number of important cases, given these considerations (of health, police and safety) a high place

82/ 197 U. S. 11 (1905). Some other miscellaneous measures, taken at random: Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380; Hanzal v. City of San Antonio, 221 S. W. 237; Dougan v. Board of Commissioners of Shawnee County, 141 Kan. 554; Summerville v. Pressley, 33 S. C. 56 (prohibiting the cultivation of more than 1/8 acre by any one person within the town limits); People v. Ryan, 230 App. Div. 252 (N. Y.).

83/ 246 U. S. 343 (1918).

84/ Pyramid Stock Co. v. Pierce, 95 Pac. 210 (1908).

85/ 103 Tenn. 421 (1899).

86/ 183 U. S. 13, 21 (1901).

as justifying such a measure. 87/ (Indeed, the conservative attitude has been to justify urban zoning purely on such grounds). In such zoning cases, points are made that it is easier for policemen to patrol when the city is zoned; that there is less likelihood of crime in purely residential districts; that zoning makes the enforcement of traffic rules more facile; that there is increased safety for children from passing traffic, in purely residential zones; that sanitary regulations may be more effectively applied; that there is greater health to the populace, and so on.

The facilitation of fire prevention and fire protection, likewise, has had a similar influence with the courts. 88/ "The isolated farm adds to the fire hazard in a forest area as much as the isolated store does in a residential area in a city. The Wisconsin State Conservation Commission estimated that one-third of the forest fires in that state were caused by the clearing activities of settlers." 89/ As an example of court reasoning, the case of State v. Jacoby, supra, may be cited. In it, the Supreme Court of Louisiana found that the fire-hazard created by a drugstore was grounds for its exclusion from a residential zone. A similar argument may be applied to the case of isolated settlers in forest areas.

At this point, it may be noted that, although conditions in cities are different from those in the country, the type of measure effectuated by the two types of zoning, (i. e., rural and urban) is the same; that is, the regulating of the pattern of occupancy in order to bring about environmental conditions favoring the peace, order, safety and health of the people.

In addition to the considerations already adduced, there is yet something to say regarding the matter of recreational facilities. Under zoning, areas of particular recreational usefulness might be reserved to such use; or at least certain land-uses could be prohibited from impairing the utility of such areas for recreational purposes. "Playgrounds and places of recreation are essential to the welfare and

87/ Euclid Village v. Ambler Realty Co., 272 U. S. 365, 382; State v. City of New Orleans, 164 La. 271; City of Aurora v. Burns, 319 Ill. 84; Ward's Appeal, 280 Pa. 458; York Harbor Village v. Libby, 136 Me. 537; R. B. Construction Co. v. Bowers, 152 Va. 871; Lamberde v. Dallas, 73 S. W. (2d) 478.

88/ See, in addition to cases already cited: State v. Jacoby, 168 La. 752; Jungel's Appeal (No. 2) 89 Pa. Sup. Ct. 548; Sullivan v. Burden, 241 N. Y. 288.

89/ C. I. Hendrickson: Rural Zoning (1935, mimeo. U. S. Dept. of Agr.), p. 6.

health of a community"; and accordingly, zoning measures which protect them have been sustained. 90/

Aside from the matter of physical robustness, there is the consideration of the mental healthfulness and comfort of the people. "Grandeur and beauty of scenery contributed highly important factors to the public welfare of the state." 91/ This may well be a consideration which will not of itself suffice; 92/ but it will have at least an auxiliary weight upon the courts. 93/ In addition, the nurturing of the public's "comfort" has some place in the police power. 94/

(9) The fostering of a more wholesome community spirit; the promotion of home ownership and a stable population; the fostering of family and other societal values, and with it, good citizenship. The poverty, population instability, human suffering, unhealthiness and other sociological ills which result from attempting to farm submarginal lands, especially in isolation from social intercourse, are all well-known. Zoning measures will work toward the mitigation of such ills. This is all to the profit of the general welfare and the good of society. "It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country" 95/

The lines of cases on child welfare is illustrative of the extensive powers which the state may exercise in these regards. At common law, the father had an almost absolute right to the care and custody of the child. 96/ However, the welfare of the child has been by statute made paramount to parental rights, and the State has assumed in the child's interest the power to interfere with parental control, even to the point of its nullification in extreme cases, whether by

90/ Howden v. Mayor of Savannah, 172 Ga. 833 (1931). But see: Bigelow v. Whitcomb, 72 N. H. 473, 65 L. R. A. 676 (1904).

91/ General Outdoor Adv. Co. v. Dept. of Public Wks., 289 Mass. 149, 185 (1935).

92/ Continental Oil Co. v. City of Wichita Falls, 42 S. W. (2nd) 236 (Texas Com. App. 1931).

93/ State v. Kiewman, 116 Conn. 458; General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85; State v. Roberge, 144 Wash. 74; Ware v. City of Wichita, 113 Kan. 153.

94/ Call Bond & Mortgage Co. v. Sioux City, 259 N. W. 33 (Iowa); Gunderson v. Anderson, 251 N. W. 515 (Minn.); Jack Lewis Inc. v. Baltimore, 164 Md. 146; Brown v. City of Los Angeles, 183 Cal. 783; Meager v. Kessler, 147 Minn. 182; Iceland v. Turner, 117 Kan. 294.

95/ People v. Havner, 149 N. Y. 195, 203-4 (1896). See: Mountain Timber Co. v. Washington, 243 U. S. 219 (1917).

96/ Shoers v. Stein, 75 Wisc. 44.

measures to assure adequate and proper care, or physical well-being, or mental development, or what not. 97/

The theory on which the right of full governmental intervention was based has been, of course, expanded beyond simply the child's own individual welfare, to include the interests of society itself in the qualities of its citizens. "To society, organized as a state, it is a matter of paramount interest that the child shall be cared for . . . in order that he shall become a healthful and useful member of the community." 98/ Society must be protected from the "dangers of incompetent citizenship". 99/ As already noted, human and social welfare legislation is not limited to the interests of childhood, but reaches as well to the whole adult population. 100/ The interests of society, wherever found, is what justifies such laws.

This whole thesis has been particularly developed in a number of zoning cases, and thus made expressly applicable to the type of measure herein treated. The introduction of the idea of citizenship and family values into the zoning concept is credited by the Georgia Supreme Court to the Supreme Court of California, whence it spread. "The establishment of strictly residential districts by zoning ordinances may be justified because it is for the protection of the civic and social values of the American home." 101/ In State, ex rel Carter v. Harper, the matter was put particularly succinctly:

"The benefits to be derived by cities adopting

97/ In re Lally, 85 Iowa 49; Jones v. Darnall, 103 Ind. 569; Gishwiler v. Dodez, 4 Ohio St. 615; Corrie v. Corrie, 42 Mich. 509; In re Bort, 25 Kan. 308; Bennet v. Bennet 18 N. J. Eq. 114; Freund on the Police Power (1904) pp. 7 and 248.

98/ People v. Ewer, 141 N. Y. 129, 133 (1894).

99/ Fogg v. Board of Education, 76 N. H. 296, 299 (1913); State v. Hoyt, 84 N.H. 33; Ex parte Crouse, 4 Wharton (Pa.) 9 (1838); State v. Jackson, 71 N.H. 552 (1902); State v. Bailey, 157 Ind. 324 (1901).

100/ See, e.g., Holden v. Hardy, 169 U.S. 366 (1898); Miley v. Miss. 232 U.S. 671 (1914); Our House No. 2 v. The State, 4 Greene (Iowa) 172, 174 (1853); Yadico v. N.Y., 264 U.S. 292 (1924); Leavitt v. City of Morris, 107 Minn. 170, 175 (1908); Buck v. Bell, 274 U.S. 200 (1927). See the interesting discussion by Professor H.E. Willis in his Constitutional Law of the U.S. (1936), p. 753 seq.

101/ Miller v. Board of Public Works, 195 Cal. 477, 492-5 (1925); Howden v. Mayor of Savannah, 172 Ga. 833, 842; State v. Roberge, 144 Wash. 74, 81-2.

such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they . . . promote the peace, tranquility and good order of the city. We do not hesitate to say that these objects afford a legitimate field for the exercise of the police power (to zone)." 102/ */

102/ 182 Wisc. 148, 158 (1923). This quotation was used by the Attorney General of Wisconsin, in passing favorably on rural land-use zoning for that State. Opinion of Sept. 12, 1931, Opinions, Vol. XX, p. 751. Further cases: Bismark v. Hughes, 53 N.D. 838, 851-2; Brett v. Building Commissioner of Brookline, 250 Mass. 73, 78 (1924); Twin City Bldg. & Investment Co. v. Houghton, 144 Minn. 1, 20; and American Wood Products Co. v. City of Minneapolis, 35 Fed. (2nd) 657 (C.C.A. 1929); Ludgate v. Somerville, 121 Ore. 643.

*/ SUPPLEMENTAL SECTION FOOTNOTE: The foregoing treatment of cases, albeit broken up into headings, is to be considered as a composite. Just as is normal with "new" things in constitutional law, rural zoning is not so much something which is unprecedented as it is a rearranging of the already existent precedents of the Law. Oftentimes a reference to a single of the foregoing items would not suffice to justify an instance of rural zoning. Some are more important than others. However, a totaling up of all the items should form a quite solid foundation upon which to erect the zoning structure. It has been noted, no doubt, that some of the cases used have been cited at more than one point in the discussion. That is because the measures which they involved have had in view more than one object which may be attained by way of the exercise of State power; and in this, they represent that bringing together of a severalty of lines of precedent in order to form a new one of which we have been speaking. In some instances, this severalty was likely essential in order to satisfy the judges' minds that the case was within the bounds of constitutionality. An outstanding example is Pyramid Land & Stock Co. v. Pierce, 95 Pac. 210, sustained apparently because six ends were attained: (1) Conservation of the range lands; (2) Protection and fostering of the stock industry; (3) Economy in public outlays; (4) Protection and development of the tax base; (5) Protection and development of the food and clothing supply; (6) Preservation of the peace.

SECTION II

DISTINCTION BETWEEN NUISANCE LEGISLATION AND ZONING LEGISLATION

In presenting the case for rural land productive-use zoning, it is essential that nuisance theory be avoided. "The distinction between the power to prohibit nuisances and the power to zone is exceedingly important." 1/

It has been traditional in constitutional law that "the maxim Sic Utere tuo ut alienum non laedas is that which lies at the foundation" of the police power. 2/ It is also upon this maxim that the theory underlying nuisance legislation is founded. However, this is not to say that police power legislation and nuisance legislation are simply coextensive or synonymous. Nuisance legislation is narrowly limited by the above-mentioned maxim, whereas the police power has developed to cover a content at many points within it only by a liberal construction. This development of the police power came by way of an extension of the maxim from the domain of private rights, to which it originally was confined, to that of the public right. 3/ When a Federal judge, for example, delivering opinion in the case of W. F. Bldg. & Loan Ass'n v. McClelland, referred to the "obligation that the owner's use of [property] shall not be injurious to the community", he was speaking of this enlarged concept of the maxim. 4/ Realistically considered, "the prevention of harm to the community" has in its turn developed into something more positive in content: namely, positive promotion of the common good, although reference to it in this way is frequently avoided. Mr. Hastings, in a profound analysis of police power some years ago, remarked in this connection that "a little experience with American lawyers and lawgivers will convince one that there is no difficulty in putting a requirement that any particular thing be done for the public good in the form of an elaborate protection against the evils arising from not having it done." 5/

1/ Jones v. City of Los Angeles, 211 Cal. 304, 313 (1930).
2/ Cooley, Constitutional Limitations (7th ed.), p. 838. "Sic utere tuo ut alienum non laedas" may be translated as follows: "So use your own that you do not harm another".
3/ See: Smead, Sic Utere . . .", 21 Cornell Law Q. (1936), pp. 276, 285, passim.
4/ 6 Fed. Supp. 292, 302.
5/ Proceedings of the American Philosophical Society, vol. XXXIX (1900), p. 416.

Be that as it may,

> "The development of the law in this regard has been in sympathy with the change which has taken place generally from the conception that the law should jealously guard the right of the individual to use his property as he saw fit, subject only to the condition that he did not maintain a nuisance thereon, to the conception that the state or community has a very definite interest in the use of private property, and the use of such property may be very broadly limited in the interests of the community." 6/

Mr. Hastings, in developing his exposé of the important distinction between nuisance theory as such and police power theory, made special introductory use of an early New York case, in which it was held that the lawful possession of a wharf was no defense to an action for a penalty incurred by refusing to comply with the order of a harbor-master, made in pursuance of his authority from the city, that room be made at the wharf for an incoming steamer. 7/ The ownership of the wharf was not allowed to interfere with that control of the harbor which was necessary in order to maintain the standing of the port; and the combined weight of precedent, usage, and public interest were held to outweigh the theoretical right of property supposed by many to be declared in the State constitution. "The owner of the wharf was not using it to anyone's injury. He merely refused, when ordered by proper authority, that of the harbor-master, to change the position of his vessel to accommodate one coming in. No special damage was shown to have occurred to anyone, but the penalty was assessed and collected. The case has never been questioned since, and is not likely to be." 8/ Again, in the Wynehamer case, famous in the annals of constitutional law, while it was acknowledged that the State might enact absolute prohibition, it was at the same time held that, inasmuch as liquor was not a nuisance per se, the confiscation of existing stocks was arbitrary, and hence impermissible. 9/ That is to say, the police power is not limited "entirely to regulations designed to promote public health, public morals or public safety, or to suppress what is offensive,

6/ State ex rel Morris v. Osborne, 22 Ohio N.P. (N.S.) 549, 554 (1920).
7/ Vanderbilt v. Adams, 7 Cow. 349 (1827).
8/ Loc. cit., 415.
9/ 13 N.Y. 378 (1856). Hastings was able, also, to employ particularly the cases Commonwealth v. Alger, 7 Cush. 53 (Mass. 1853), and Thorpe v. Rutland Ry. Co., 27 Vt. 140 (1855).

but extends to so dealing with conditions that exist as to bring out of them the greatest welfare of the people." 10/

The Supreme Court of the United States has devoted attention to the problem, in the leading case on city zoning:

> "In solving doubts, the maxim sic utere tuo ut alienum non laedas, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power." 11/

That is, the boundaries of the police power lie quite outside the boundaries of nuisance theory. "While the prevention of nuisances is a proper and well recognized ground for the exercise of the police power in the interest of the public welfare, it does not bound or limit the scope of such power." 12/ The law of nuisances does not control, but may be of use for the analogies which it can furnish.

In Section I, supra, will be found numerous cases upholding legislation which has no relation at all to nuisances; for example, certain cases on conservation, on compulsory education, etc. Even of Bacon v. Walker and Omaechevarria v. Idaho 13, in which statutes restricting sheep grazing so as to protect the range lands were upheld, it has been said:

> "We do not understand that the fact that sheep may be offensive entered into the cases . . . at all. Such may have been one of the moving causes which prompted the Legislature to enact the law, but the courts uniformly upheld the legislation on the ground that it was within the police power of the state". 14/

Coming now specifically to zoning, "The confusing of zoning-law

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10/ People v. Cerlides, 265 N.Y.S., 765,770 (1933): drawing on Bacon v. Walker, 204 U.S. 311, 318.

11/ Euclid Village v. Ambler Realty Co., 272 U.S. 365, 387-8 (1926). (The italics of only the maxim are in the original).

12/ City of Des Moines v. Manhattan Oil Co., 193 N.W. 1096, 1106 (1923).

13/ 204 U.S. 311; 246 U.S. 343, respectively. See supra, pp. 3 and 24.

14/ In re Calvo, 253 Pac. 671, 674 (N.M. 1927).

questions with nuisance questions, or the reducing of the constitutional law of property regulation to the law of nuisances, fails to regard the principle so well expressed in Bacon v. Walker, where the Supreme Court of the United States said:

> 'That power (police power) is not confined to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people.'"

What is zoning? Is it the application of a "general constructive plan" whereby the territory of the community is "allotted to different uses, in such a way as to prevent or reduce the various types of wastes and disorders of unplanned development, and to promote the convenience, economies, efficiencies, and amenities of the community . . ." (referring specifically to city zoning). By its very definition, with the emphasis on planned development, zoning is marked as something standing on its own, apart from nuisances. And, it is even said, the city zone-plan's restriction of "nuisance industries" to designated districts""is not a suppression of nuisances, but is a part" of such aforementioned general constructive plan. 15/ Urban zoning "grew" precisely from "the failure of the law of nuisances to adequately handle the rapid growth and scientific development of cities." 16/

Rural zoning must be unfettered from nuisance ideology, if it is not to be still-born; for the instance in which any particular use of the land in a rural area -- where, of course, population is sparse relative to what it is in cities -- would constitute a nuisance would ordinarily be extremely rare, and the possibility of zoning correspondingly constricted. 17/ In the case of city zoning, on the other

15/ Alfred Bettman , "Constitutionality of Zoning", Harvard Law Review, Vol. XXXVII (1924), 834, 841-42. An illustration of Mr. Bettman 's last statement is afforded by Gunderson v. Anderson, 190 Minn. 245 (1933). There, the plaintiff had secured an injunction against defendant's funeral establishment as a nuisance. Under a subsequent zoning ordinance defendant's premises fell within a district in which such use was permitted. Defendant thereupon reopened the case and sought to vacate the injunction. Held,that the injunction should continue, since the operation of the funeral home was in fact a nuisance.

16/ Note in Virginia Law Review, Vol. XVII (1930), pp. 202-05.

17/ The rural situation which might come closest to resembling or constituting nuisance situations would be that of a fire hazard created by an isolated settler, and that of a soil drift menace resulting from an erosive condition.

hand, the necessity for a differentiation has not existed to the same extent; and in view of the facts presented by most city-zoning cases which have come up for judgment, the courts have accordingly generally not bothered to make the distinction. 18/ Nevertheless, this is by no means to say that the concept of nuisances and that of zoning is always confounded by the courts. The truth is, that "the first zoning ordinances held valid amounted to little more than nuisance regulations." However, the law of nuisances "was inadequate to take care of all the exigencies that arose in zoning development". 19/ "There has been within the last ten years a noted liberalization of judicial thought in the direction of conceding that health and safety and the suppression of nuisances are not the sole foundations of control." 20/ Some courts have taken occasion to proclaim the distinction. It has been noted supra that the Supreme Courts of the United States and of Iowa have so done. The Illinois Supreme Court, for its part, asserted in the Aurora v. Burns case:

> "The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is part of the general plan by which the city's territory is allotted to different uses . . ." 21/

This passage was approvingly quoted in Beveridge v. Harper & Turner Oil Trust Co., 22/ as well as in the Euclid Village case. 23/

A case in which the problem could not be avoided, on account of the facts presented, was Jones v. City of Los Angeles; 24/ and here it was held that the city could not suppress an existing insane hospital in a residential district zoned against such hospitals, although it was allowed by the court that such additional hospitals could in the future be excluded. "We repeat", said the court, "that the ordinance involved herein is to be supported upon principles of

18/ In the case of city zoning, the ordinances have rarely attempted to suppress any established use.
19/ Comment on "Retroactive Zoning Ordinances" in Yale Law Journal, Vol. XXXIX (1930) @ p. 737-8.
20/ Ernest Freund, "Some Inadequately Discussed Problems of the Law of City Planning and Zoning", Illinois Law Review, Vol. XXIV, (1929), p. 135.
21/ 319 Ill. 84, 95 (1925: a leading case upholding zoning).
22/ 168 Okla. 609, 615 (1934).
23/ @ p. 392.
24/ 211 Cal. 304 (1930).

zoning and not as a prohibition directed against actual nuisances." Here was a clear-cut decision that the technique of zoning (which looks to the obviating in the future of proscribed uses) is not the same as that of nuisance legislation (which comprehends the suppression of presently engaged-in uses); that zoning is not tied to nuisance theory.

Valuable evidence of the point is furnished also by other cases involving non-conforming use. In Manos v. Seattle the Supreme Court of Washington held that the city could not suppress as a nuisance an existing skating rink in a zone from which such skating rinks were excluded. 25/ Had zoning legislation been the same thing as nuisance legislation, the existing rink would have been abatable, inasmuch as the future establishment of rinks was prohibited. "Equal protection of the laws" would have exacted a similarity of treatment as between the two cases. The case of Standard Oil Co. v. Charlottesville, decided by the Federal Circuit Court of Appeals, fourth circuit, is another illustration. 26/ The facts were as follows: the city of Charlottesville (Va.) attempted to apply an ordinance making it unlawful to store or keep for sale gasoline within a certain designated district, within 100 feet of any building used solely for a residence, but exempting filling stations or gasoline storage places already in existence. It was not a zoning ordinance, but an ordinance passed in the interests of public safety. The court held it invalid, because of the discrimination made in favor of established uses. The city sought support in zoning jurisprudence, which universally permits established non-conforming uses, but to no avail.

> "The line of cases exempting existing business from the terms of zoning ordinances", said the court, "have no application; for in the case of such ordinances the classification adopted has a reasonable relation to the end in view, whereas, in the case of an ordinance which forbids the carrying on of a business as dangerous to the community, the exemption of existing businesses has no such reasonable relation. In the case of a zoning ordinance the council adopts a plan for the development of the city, not for the prohibition of things which threaten the public safety. The object in view does not demand that existing businesses in a residential district cease at once, but merely that increase of business be prevented so

25/ 173 Wash. 662 (1933).
26/ 42 Fed. (2nd) 88, 93 (1930).

as not to hinder the development of the district as residential." 27/

Contrast such cases with a typical holding of a court in a case involving zoning:

"to exempt buildings already devoted to a use from a prohibition of such use of other building or buildings thereafter erected in a specified area is not unequal but lawful . . ." 28/

Some courts have indeed seen fit to assert not only that such discrimination is lawful in the case of zoning, but that the absence of it would be positively unlawful. For example:

"Such discrimination is necessary if . . . zoning is to be undertaken at all -- unless all 'nonconforming' structures and uses are to be barred from zones created for the benefit of conforming uses. Such an alternative would ordinarily be too drastic for legislative or judicial countenance." 29/

In addition to the citations of authority and case already given at various points, reference should be further made for supporting material on the general subject of the difference between nuisances and zoning, to: University of Pennsylvania Law Review, Vol. LXXXI, p. 81 (1932); Illinois Law Review, Vol. XXIV, p. 335 (1929-30); Georgetown Law Journal (O'Reilly), Vol. XXIII, pp. 218, passim (1935).

27/ The court seemed, in effect, to be following and clarifying the stand already taken by its Supreme Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, wherein the latter refused to permit the enforcement of an ordinance which would prohibit the undermining, by a coal company, of residence buildings which the coal company had the vested contractual right to undermine.

28/ Spector v. Building Inspector of Milton, 250 Mass. 35, 70-71 (1924).

29/ City of Norton v. Hutson, 142 Kan. 305, 307 (1935). Elizabeth City v. Aydlett, 201 N.C. 602 (1931); and other cases cited supra. Zoning and planning opinion is in generally unanimous agreement with this view. See the list given in note on p. 737 of vol. XXXIX Yale Law Journal; also Werner, op. cit., p. 21-22; Robt. Whitten, in Journal of Land and Public Utility Econ., Aug. 1936, p. 313-14; F. B. Williams, The Law of City Planning and Zoning, p. 201; Jessess and Lowell, Special Bulletin 157 (Aug. 1931, Agri. Ext. Div., University of Minnesota), p. 4.

SECTION III

DUE PROCESS OF LAW IN RELATION TO ZONING

In the constitutional system of the United States, every right of the government to legislate has to be treated in its relation to the limitations which must be observed in exercising that right, existing to protect the individual from arbitrary State action. The great constitutional restraint on any exercise of the police power is the "due process of law" clause, contained in the Fourteenth Amendment to the Federal Constitution as well as in State constitutions. Often, seemingly, "there exists some strange misconception of the scope of this provision";[1] but, as the United States Supreme Court said in Nebbia v. New York,[2]

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process."

> "Under our form of government, the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute. . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . Thus has this court (i. e., the United States Supreme Court) from the early days affirmed that the power to promote the general welfare is inherent in government . . . These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yiled to the public need."

1/ J. Miller in Davidson v. New Orleans, 96 U. S. 97, 104.
2/ 291 U. S. 502, 525 (1934).

The question is: "Would rural zoning deprive a person of his property without due process of law?" If this question is to be answered in the negative, three essential conditions must be met.3/ First, the objects to be attained must be within the proper scope of the police power. That rural zoning meets this test was demonstrated in Section I. Second, the measures adopted must bear a reasonable and substantial relation to such objects. In Section I, again, it was pointed out from time to time, at appropriate places, how rural zoning was designed to effectuate such objects. Zoning does not have to be the only possible measure; nor does it have to be a guaranteed cure-all for the ill. No legislation ever is, as a general proposition. The measures adopted under the police power "need not be the most adequate conceivable."4/ Zoning is a very substantial and efficacious remedial measure which the legislature in its constitutional discretion has chosen to adopt; and there should be no quibble on this score. The courts accord the highest respect to the legislature's judgment.5/

The third condition is that the regulation be in itself reasonable, and not arbitrary. To a consideration of this point we now turn. Just as it is said that the test of the pudding is in the tasting, so is the test of reasonableness in the actual application. Now, as generally conceived, the actual application of zoning comes not in the enabling statute, but in the local zoning regulations which are adopted and enforced under the authority of the act. This means that some particular ordinance or some particular application of an ordinance could be found invalid without the general principle of zoning, embodied in the enabling statute, being affected. The enabling statute, in effect, constitutes simply an authorization to the appropriate governmental subdivisions (ordinarily the county; in New England, the town; in Louisiana, the parish) to exercise the State's police power in a particular respect. This should be proper and valid, if the provisions of the enabling statute

3/ In most of the cases discussed in Section I, for us the pertinent attack against the legislation involved was based on alleged infringement of "due process of law." A notable exception was the immigration cases (supra, p. 22). Here the basic contention was an alleged infringement of paramount Congressional jurisdiction over immigration. This type of case is, however, essentially parallel with the due process cases, since the question in each is the extent to which the exercise of the police power of the States is limited by restrictions contained in the Constitution.

4/ Freund on the Police Power, p. 157; Central Lumber Co. v. S. D., 226 U. S. 157; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.

5/ Lawton v. Steele, 152 U. S. 133, 140; Sproles v. Binford, 286 U. S. 374, 388-9; Armour & Co. v. N. D., 240 U. S. 510; Jacobson v. Mass., 197 U. S. 11.

are correctly drawn.6/

In this regard it is pertinent to note the type of analysis employed by the courts in their opinions relative to city zoning. Though there have been a number of particular ordinances, parts of ordinances, or particular applications thereof, declared unconstitutional at various times, it is very unusual to find an instance in which an enabling statute has been declared unconstitutional.7/ Early, before the principle of city zoning had come to be generally considered as definitely established, there was some tendency on the part of the judiciary to discuss the constitutionality of the police power in relation to the enabling statutes as such.8/ But even at that, in the two cases last cited in the footnote preceding the final argument was that the real test is in the ordinance. The Maine Justices, for example, concluded:

> "Although the proposed bill may lawfully delegate authority to exercise the police power, every ordinance enacted by the city government must stand or fall on its own merit."9/

By and large, the procedure of the courts has been to direct attention solely to the ordinance, and to take the constitutionality of the enabling statute for granted either explicitly, 10/ or implicitly (as ordinarily). This was essentially true even of the

6/ 15 C. J. 458-9; 1 L. R. A. 86-7; Gordon v. Commissioners of Montgomery County, 164 Md. 210 (1933); Park v. Greenwood County, 174 S.C. 35 (1934); Kirkpatrick v. Board of Supervisors of Arlington County, 146 Va. 113 (1926); N. C. & St. L. Ry. v. Marshall County, 161 Tenn. 236; Central Pac. R. R. Co. v. Costa, 258 Pac. 991 (Cal. App. 1927); Maricopa County Municipal Water Conservancy Dist. No. 1 v. La Prade, 40 Pac. (2nd) 94 (Ariz. 1935); State v. Judge of Gloucester County, 50 N. J. L. 585 (1888); Board of Commissioners of Marion County v. Jewett, 184 Ind. 63 (1915); Albert v. Gibson, 141 Mich. 698 (1905); M-K-T.R. Co. v. Hays, 119 Kan. 249 (1925). A special study of the constitutional set-up in any given state is a necessary prerequisite to the drafting of enabling legislation.

7/ See, however, the curious procedure followed in an early Georgia case; Smith v. Atlanta, 161 Ga. 769 (1926 Cert. denied; 271 U. S. 672).

8/ See, for example: City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096 (1922); Opinion of the Justices, 234 Mass. 597 (1920); Opinion of the Justices, 124 Maine 501, 509 (1925).

9/ and 10/ See next page.

epochal Euclid Village v. Ambler Realty Co. 11/ Other cases may be further cited as having some especial interest in this respect. 12/

Whether the ordinance is considered reasonable will depend on its own provisions and the circumstances in which it applies. The cost of complying with a police regulation may be an element bearing upon its reasonableness. 13/ But the loss of some private right is a characteristic feature of any exercise of the police power. And the cost to the individual may have to be a very great one before it becomes an element in preventing the exercise of the police power relative to a valid object. 14/

Zoning does not deprive anyone of his ownership of property. Not only the ownership, but the physical property itself as well, remains intact. The only restriction is in the uses to which the property can be put and in its unlimited disposal. The Supreme Court of Iowa

9/ See also, especially; City of Providence v. Stephens, 103 Atl. 814 (R. I. June, 1926); Gorieb v. Fox, 134 S. E. 914 (Va. Sept., 1926); Bismark v. Hughes, 208 N. W. 711 (N. D. 1926); Lirsitz v. Parr, 164 Md. 222, (1933); Fritz v. Hosier, 112 Ohio St. 628 (1925).

10/ Handy v. Village of South Orange, 118 Atl. 838 (N. J. 1922).

11/ 272 U. S. 365 (Nov. 1926). This case settled the constitutionality of the urban zoning principle.

12/ Vernon v. Town of Westfield, 124 Atl. 248 (N. J. 1923); State ex rel Penrose Investment Co. v. McKelvey, 301 Mo. 1 (1923); City of St. Louis v. Ivrail?, 301 Mo. 231; Richard v. Zoning Board of Review, 130 Atl. 802 (R. I. 1925); [illegible] v. Post, 252 S. W. 1091 (Ky. Apr. 1926); Kron v. City of Portland, 116 Ore. 141 (1925); Morrow v. City of Atlanta, 162 Ga. 228 (1926.)

13/ Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413.

14/ Marblehead Land Co. v. Los Angeles, 47 Fed. (2nd), 828 (C. C. A. 1931); Erie R. R. Co. v. Williams, 233 U. S. 685 (1914), Nectow v. Cambridge, 277 U. S. 183.

once remarked: "As we have already said, it [zoning] does not deprive the defendants of their property, or assume to give any right or interest therein to anyone. It does assume to regulate its use in the interest of the public." 15/ It may be further in point to examine by categories just what impairments in the "values" attaching to the propty would result from rural zoning.

(a) Situs value. This is the type of value (i.e., the real estate agent's "location value") which is primarily impaired in city zoning. Conceivably, no doubt, there might come about impairments on this score in zoning for rural land-productive use, in districts closed to all settlement. Viewing the situation realistically, however, this possibility appears to be largely hypothetical, since as a matter of fact the land in rural areas typically apt to be closed up is not in demand for residential purposes. Of course, there would be impairment of this sort, insofar as there was "urban-type" zoning carried on.

(b) Sub-soil value. Rural zoning, again, would leave the owner in his complete right to the utilization and disposition of the minerals and other sub-surface products. On the other hand, city ordinances have at times deprived property owners of such rights. 16/

(c) Speculative values. This is a type of values which city zoning, as well as rural zoning, would impair. If they may be impaired within cities, there is no reason why they might not also be impaired without. Speculative or contingent values receive scant sympathy from the courts. 17/

15/ City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 1109 (1922). This is not to say, of course, that the use of property is not itself a property right, within the protection of the Fourteenth Amendment.

16/ Marblehead Land Co. v. Los Angeles, 47 Fed. (2nd) 528 (C.C.A. 1931); Anderson-Kerr v. Van Meter, [illegible] Pac. 173; Van Meter v. Westgate Oil Co., 32 Pac. (2nd), 719; Be[illegible] v. [illegible] Turner Oil Trust, 35 Pac. (2nd), 435; People [illegible] rel Ven[illegible] v. Walsh, 201 N. Y. S. 226 (1923). Also: Sunny Slope Water Co. v. Pasadena, 33 Pac. (2nd) 672 (Cal. 1934); Village of [illegible]pace Park v. Arrett, 12 Fed. (2nd) 240 (1926); Lamb v. A. D. [illegible], [illegible] Mass. R. 649 (1932) In re Kelso, 147 Cal. 609; and, Commonwealth v. Tewksbury, 11 Metc. 55 (Mass. 1846); Hodges v. Perine, 24 Hun (31 Sup. Ct. N. Y.) 516 (1881).

17/ See next page.

(d) Soil-Productive values. The long-run aim of rural land-use zoning, far from impairing such values, is to conserve them. There might be certain temporary diminutions of profits as a result of rural zoning, and to this extent an argument of impairment of value might be made by one attacking such regulations. It is difficult to perceive what other similar attack there could be. Further remarks need not be made, except to point out that even in cities there have been occasionally regulations impairing values in the same category. 18/

All this is to say that the possible impairment of values could not normally be great in any case in which rural zoning is carried out reasonably. The owner would be left with the "substantial enjoyment" or a large "beneficial use" of his land. 19/ This consideration should weigh heavily on the side of the validity of such measures, particularly in view of the very great monetary losses which the courts have allowed in city zoning and in other police regulations. Three examples of many will be cited.--The fact that the result of a Minneapolis zoning ordinance was a depreciation in the value of a certain property to one-fifth or less of its value otherwise did not serve to render it invalid. 20/ In the famous Euclid case the bill of complaint alleged in vain that, whereas the market value of the property in question was $10,000 per acre unrestricted, its value would fall to not in excess of $2,500 per acre if zoning were put in as proposed. 21/ The statute upheld in Powell v. Pennsylvania had the effect of rendering a home oleomargarine manufacturing plant worthless. 22/

17/ Hool v. Kansas City, 131 Kan. 290 (1930); Joyce on Injunctions (1909), sec. 1069; L.R.A. 1917. A. pp. 409-411, and the cases there cited.

18/ See: Call Bond and Mortgage Co. v. Sioux City, 259 N. W. 33 (Iowa 1935); State v. Harrison, 134 La. 384; De Vito v. Pearsall, 115 N.J.L. 323 (1935 greenhouses); Chudnov v. Board of Appeals, 113 (Conn. 49) (1931); Summerville v. Fressley, 33 S. C. 36 (1889); Green v. Savannah, 6 Ga. 1 (1849).

19/ See: Freund on the Police Power, p. 625; Opinion of the Justices, 103 Maine 506, 512 (1908); Sundlun v. Zoning Board of Review of Pawtucket, 145 Atl. 451 (R. I. 1929); State ex rel Taylor v. Jacksonville, 101 Fla. 1241-1245 (1931).

20/ Amer. Wood Products Co. v. Minneapolis, 21 Fed. (2nd), 440 (1927) (Aff'd; 35 Fed. (2nd) 657).

21/ 272 U. S. 365, 384.

22/ 127 U. S. 678. See also, inter alia, Honnold, vol. III, p. 1909, and cases there; and the Hadacheck case, 239 U. S. 394.

Rural zoning for land-productive use is furthermore not subject to another line of attack sometimes argued against city zoning; namely, that in effect "property is taken from A and given to B because B is given the right to prevent the beneficial use of A's property." 23/

In skeleton, the requisite reasonableness should be assured throughout the enabling act expressly and by implication: procedurally, by provision for independent study and recommendation by a zoning commission, by provision regarding assistance and advice from competent governmental agencies, by provision for ample public hearings, and by provision for a board of adjustments. 24/

It is the task of the counties (or other administering units) to see to it that the ordinance is drawn carefully, rationally and equitably, and is applied in the same way. "When zoning ordinances are sustained, it is on the theory that the police power of the State has been properly exercised by the municipal authorities to which it was delegated." 25/ But such "proper exercise", on the other hand, does not mean that a police power regulation need be invalid merely because certain innocent uses might fall within, or certain supposedly bad uses outside, the proscription. 26/ The whole field of possible abuses need not be covered. 27/ A classification "having some reasonable basis will not offend against" due process "merely because it is not made with mathematical nicety, or because in practice it results in some inequality". 28/

23/ McBride, C. J., dissenting in Kroner v. City of Portland, 116 Ore. 141, 170. This attack rests on the circumstance that in urban zoning individuals are prevented from enjoying their property in certain ways seen to be deleterious to the property of other individuals, and it is argued that thereby the protected individuals are in fact enjoying the property of the one who feels himself restricted.

24/ See, for example, Deynzer v. Evanston, 319 Ill. 226; Aurora v. Burns, 319 Ill. 84, 98 (1925); Freeman v. Board of Appeals, 34 Pac. (2nd) 534, 538 (Mont. 1934).

25/ Perrin's Appeal, 305 Pa. 42, 49 (1931).

26/ Bond v. Cooke, 237 App. Div. 229; R. B. Construction Co. v. Mayor, 152 Md. 671; Euclid Village v. Ambler Realty Co., 272 U. S. 365; Hebe Co. v. Shaw, 248 U. S. 297.

27/ Central Lumber Co. v. S. D., 226 U. S. 157; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205.

28/ See next page.

Basically: "Laws are not judged by theoretical standards, but by the concrete conditions which induce them." 29/ And in the final analysis, the ". . . validity of a police regulation . . . must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose." 30/ "Whether a restriction in a given case is reasonable or not depends, not so much upon the application of general principles or rules, as upon the facts and conditions out of which the question arises." 31/

The support of public opinion will be an aid. 32/ Mr. Justice Holmes' remark about the salutary juridical effect of "a strong and preponderant opinion" 33/ has been widely quoted by the courts. 34/ But while a favorable public opinion is invaluable, and may carry considerable influence with the courts, it does not of itself alone suffice. 35/

28/ Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78; Sproles v. Binford, 286 U. S. 374, 388 (1932): "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the XIV Amendment was intended to secure."

29/ Holloway, J., in State v. Loomis, 75 Mont. 80, 95 (1926).

30/ Chi. B. & Q. R. R. v. Drainage Commission, 200 U. S. 561, 592 (1906).

31/ Jack Lewis Inc. v. Baltimore, 164 Md. 140, 163 (1933). Welch v. Swasey, 214 U. S. 91, 105 (1909); Vernon's Kansas City St. Andrews Society v. Kansas City, 54 Fed. (2nd), 1071 (1931); Rothwell v. Dennis, 97 Pa. St. 78, 83 (1881); Clark v. Nash, 198 U. S. 361, 370 (1905); McLean v. Denver, 203 U. S. 38, (1906).

32/ Mayor of Wilmington v. Turk, 14 Del. Ch. 382, 402 (1925); Miller v. Board of Public Works of Los Angeles, 195 Cal. 477, 485 (1925 Aff'd; 273 U. S. 781).

33/ Noble State Bank v. Haskell, 219 U. S. 104, 111.

34/ As in: Asher v. Ingels, 13 Fed. Supp. 504 (1936); U. S. Bldg. & Loan Ass'n. v. McClelland, 3 Fed. Supp. 280 (1934); Kauffman v. Burden, 241 N. Y. 286, 290 (1925); Phi Delta Phi Chapter of Phi Beta Pi, 213 N. W. 835 (Wis. 1927); People v. Associated Oil Co., 292 Pac. 717 (Cal. 1930). See generally, Corwin (1901), p. 10.

35/ Penn Coal Co. v. Mahon, 260 U. S. 393. See also Dodd: The Process of Law (1926), pp. 361 et seq.

It is to be remembered, again, that the air of newness which a piece of legislation breathes will not of itself be an argument against its validity. 36/ "The police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety and morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops within reason, to meet the changed and changing conditions." 37/ The applicability of the police power keeps pace with the times and the progressing needs of society. "In interpreting it we must bear in mind the greater need for social control in the constantly changing world." 38/ The late Justice Holmes once said, in the case of Noble State Bank v. Haskell, that the police power "extends to all the great public needs." 39/ An earlier generation might have condemned rural zoning as a temerarious interference with the rights of property and contract, because its necessity for the general welfare was not then apparent. However, the present generation presumably would no longer condemn, since in recent years the urgent need in many parts of the country for such a measure has become glaringly patent.

The police power is "one of the most essential powers of government, one that is least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative need for its existence precludes any limitation upon it when not exerted arbitrarily . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community." 40/

Before concluding, a well-known principle of constitutional law is to be emphasized: to wit, that every presumption is in favor of the validity of legislation and every doubt is to be resolved in that direction. A very large degree of discretion and judgment is allowed by the courts to the legislative branch. The authorities entrusted with the regulation, and not the courts, are primarily the judges of the necessities of local situations, and the courts may only interfere with laws or ordinances passed in pursuance of the police power when they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of it or of the authority conferred. 41/

36/ Munn v. Illinois, 94 U. S. 113.
37/ Miller v. Board, 195 Cal.477, 484-5 (1925).
38/ Premier-Pabst Co. v. State Board of Equalization, 13 Fed.(2nd) 90, 96 (1935).
39/ 219 U. S. 104, 111 (1911).
40/ Hadacheck v. Sebastian, 239 U. S. 394, 410 (1915).
41/ See following page.

SECTION IV

CONCLUDING REMARKS

Not only present evils but the evils of the future as well must be visioned. "It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean [only] actual definite injury but obstacles to a greater public welfare." 1/ The solution of the problems which zoning seeks to effect is not a concern simply of today, but of tomorrow as well. The evil is a pressing one now, but if it is allowed to remain uncorrected, it may be expected to become increasingly more acute. Government is looked on as a going concern, whose interests are timeless, with responsibilities for those to come. "In the enactment of police regulations the legislative body is not confined to present conditions alone, but may look to the future." 2/ This is a fact which the courts recognize; and the philosophy of it has been particularly explicit in some of the urban zoning cases. The Ohio State Supreme Court in 1923, in upholding the constitutionality of certain city zoning regulations, said:

> "This problem must be viewed from the standpoint of coming generations. Regarded from the limited outlook of the immediate present, it is easy to claim with some degree of cogency that there is no relation between these measures and the public health, safety and morals. Taking a long view into the past . . . we do see a real relation between the substantial material welfare of the community and this effort." 3/

1/ Hornold. Supreme Court Law III. p. 1004, and cases there cited; New Orleans Public Service v. City of New Orleans, 281 U. S. 682; Pierce v. L. Co., 264 U. S. 242; Standard Oil Cases, 99 U. S. 700, 718; Powell v. Penn., 127 U. S. 678, 684; Gordon's Kansas City St. Andrews Soc. v. Kansas City, 58 Fed. (2nd) 933 (C. C. A. 1932); Cusack Co. v. Chicago, 242 U. S. 526.

2/ East v. Van Deman and Lewis, 240 U. S. 342, 357 (1916).

Odd Fellows' Cemetery Assn v. San Francisco, 140 Cal. 226, 234 (1903). All the many cases sustaining urban zoning might be cited, for either implicitly or expressly they of necessity follow such a philosophy. The same can be said of cases sustaining measures of conservation of resources.

3/ See next page.

As a final word, we may hope that heed will be taken of a sad reflection recently made by the Mississippi Supreme Court:

> ". . . we can now see and appreciate that had these laws come earlier, had been earlier perfected and had at an earlier date received approval as to their constitutional validity, an almost incurable situation which now prevails . . . could and would have been prevented." 4/

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3/ Pritz v. Messer, 112 Ohio St. 628, 645 (1925); also: Marblehead Land Co. v. City of Los Angeles, 47 Fed. (2nd) 528 (C.C.A. 1931); Standard Oil Co. v. Bowling Green, 244 Ky. 332 (1932); Sunny Slope Water Co. v. City of Pasadena, 1 Cal. (2nd) 87 (1934); York Harbor Village Corp. v. Libby, 126 Me. 537, 542 (1928).

4/ City of Jackson v. McPherson, 162 Miss. 164, 174 (1932).

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